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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1947.

**No. 393**

EDGAR C. JOHNSTON,

*Petitioner,*

*vs.*

ARROW PETROLEUM CO., A CORPORATION,

*Respondent.*

**REPLY TO BRIEF OF RESPONDENT.**

✓ JOSEPH B. FLEMING,

JOSEPH H. PLECK,

EDWARD C. CALDWELL,

33 N. La Salle Street,

Chicago, Illinois,

*Attorneys for Petitioner.*

J. N. SAYE,

Longview, Texas,

*Of Counsel.*



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MAY IT PLEASE THE COURT:

Respondent does not question the proposition that the petitioner has been denied due process of law if the Circuit Court of Appeals based its decision on the assumed existence of a fact, contrary to the record, which the petitioner never had an opportunity to meet by the production of evidence.

The petition is predicated upon the ground that the Circuit Court of Appeals, as shown by the opinion, assumed that the default of the respondent in failing to pay demurrage arose out of a dispute or disagreement as to the amount due, contrary to the admitted allegations of the answer that the respondent "categorically refused to pay any demurrage whatsoever due" the respondent (R. 45), and that the defaults in the payment of demurrage were

“intentional breaches of said contract in each instance” (R. 46).

The jurisdictional basis of the petition is not challenged by the respondent. Respondent in its brief merely contends that the petitioner has not presented a case within the authorities cited in the petition; respondent does not dispute these authorities or cite any authorities to the contrary and therefore impliedly admits that if petitioner has made out a case within the application of the authorities cited, this Court may take jurisdiction by granting the writ of certiorari.

In support of its position, the respondent argues, in effect, that the record does show a dispute between the parties as to the amount of the demurrage due and that therefore the decision of the Circuit Court of Appeals was not based upon any assumption of facts not in the record. Respondent admits that as far as the *pleadings* are concerned the fact is that it categorically refused to pay any demurrage whatsoever due the petitioner. In its brief the respondent states (8):

“The only thing that stands admitted by Arrow’s motion testing the sufficiency of the Answer is that Arrow categorically refused to pay any demurrage. Johnston claimed the amount due was \$4,433.66. The motion admitted this.”

The existence of the dispute, the respondent contends, is to be inferred from the stipulation, which was entered into by the parties to avoid the necessity of taking evidence on the amount of demurrage due. Respondent contends that the mere fact that the answer claimed demurrage in the amount of \$4,433.66, whereas the amount agreed upon in the stipulation was only \$2,990.62 shows that there must have been a dispute as to the amount of demurrage due and that the validity of the judgment must be tested in the light of this supposed fact.

In its brief respondent states (9):

“We feel that the correct answer is that the ruling on the answer is to be tested in the light of the admission that \$4,433.66 was owing; but that the validity of the judgment must be tested in the light of the figure determined by the *stipulation*.” (Italics ours.)

Manifestly, the respondent, in attempting to support the decision of the Circuit Court of Appeals, has fallen into the error which is implicit in the opinion of that Court; respondent is attempting to supply facts outside of the record by drawing unwarranted deductions from a strictly limited stipulation, contrary to the theory and averments of the answer, which stand admitted of record. The stipulation was made upon the express understanding that no inference of a dispute could be drawn from it (R. 108, 113, 114-115, 178-179). The trial judge expressed his understanding that the stipulation was not to be construed as an admission by the petitioner that the respondent's failure to pay demurrage was based on a dispute as to the amount due (R. 116, 148, 149, 150).

The stipulation does not purport to supply proof in support of either party's case. By agreeing, to avoid the taking of evidence, that the respondent owed \$2,990.62 instead of \$4,433.66 for demurrage, the petitioner did not admit that prior to the cancellation of the contract by him, respondent's refusal was based on a disagreement as to the amount due, rather than upon an unqualified repudiation of the demurrage liability, as set forth in the answer. The stipulation concerning the amount of the demurrage due is totally unrelated to the admitted averment that the respondent, before the cancellation of the contract by the petitioner, has renounced its agreement to pay any demurrage whatsoever.

The respondent urges that there are no “findings” in

the opinion of the Circuit Court of Appeals. It must be conceded, however, that the Circuit Court of Appeals does not refer to the factual allegations of the answer that the respondent "categorically refused to pay any demurrage whatsoever due" the petitioner (R. 45) and that respondent's defaults in paying demurrage due "were intentional breaches" of the contract "in each instance" (R. 46). Authorities cited by the petitioner on the effect of repeated, wilful defaults are ignored. The opinion discloses that the Circuit Court of Appeals, contrary to the facts of record, lays emphasis on a supposed disagreement as to the amount of demurrage due and, like the respondent in its brief, rejects from consideration the petitioner's admitted factual allegations that the successive defaults of the respondent in failing to pay any demurrage whatsoever were intentional and wilful breaches of the contract. The petitioner, therefore, has been denied due process of law.

Respectfully submitted,

JOSEPH B. FLEMING,  
JOSEPH H. PLECK,  
EDWARD C. CALDWELL,  
33 N. La Salle Street,  
Chicago, Illinois,  
*Attorneys for Petitioner.*

J. N. SAYE,  
Longview, Texas,  
*Of Counsel.*